

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CALVIN D. REEDY)	
Claimant)	
VS.)	
)	Docket No. 1,011,943
PHILLIPS SOUTHERN ELECTRIC)	
Respondent)	
AND)	
)	
BUILDERS ASSOCIATION SELF-INSURERS')	
FUND OF KANSAS;)	
CONTINENTAL WESTERN INSURANCE CO.;)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurers)	

ORDER

Continental Western Insurance Company appealed the August 4, 2005, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant alleges he injured his neck, back, and both arms in a series of accidents commencing August 5, 2004, and continuing each working day thereafter. The parties appeared before Judge Clark at a preliminary hearing on August 4, 2005. Following that hearing, the Judge issued the August 4, 2005, Order in which the Judge held claimant "was injured each and every working day through August 3, 2005." In addition, the Judge held that claimant provided respondent with timely notice of the accident and that Continental Western Insurance Company (Continental Western) was responsible for paying the preliminary hearing award.

Continental Western, which allegedly provided respondent with workers compensation insurance coverage from November 1, 2004, through the present, contends Judge Clark erred. It argues claimant failed to prove he sustained a work-related injury, that any such work-related injury arose out of and in the course of his employment with respondent, and that claimant also failed to prove that he gave respondent timely notice of his accidental injuries. Continental Western contends claimant alleged work-related injuries in March 2002, April 8, 2003, and June 12, 2003, and that the "evidentiary picture

which has actually emerged is one involving physical conditions of the Claimant which have continued to develop and bother him ever since the original injuries occurring in 2002 and 2003.”¹ Accordingly, Continental Western requests the Board to vacate the August 4, 2005, Order.

Builders Association Self-Insurers’ Fund of Kansas (Builders), which provided workers compensation liability coverage to respondent from April 1, 2001, through December 31, 2003, contends the August 4, 2005, Order should be affirmed. Builders argues Judge Clark correctly determined the appropriate accident date for claimant’s repetitive trauma injuries was August 3, 2005. Moreover, Builders argues claimant’s preexisting condition has been aggravated and worsened due to his employment with respondent.

Another of respondent’s former workers compensation insurance carriers, Liberty Mutual Insurance Company (Liberty), also appeared at the preliminary hearing and has filed a brief in this appeal. Liberty, which provided workers compensation coverage for respondent between January 1 and November 1, 2004, generally agrees with Continental Western’s argument that claimant failed to prove he sustained a work-related injury from August 2004 through the present. Moreover, Liberty contends claimant sustained an intervening injury in July 2005 that is responsible for his present back pain. In short, Liberty requests the Board to dismiss it from this claim as the record allegedly “fails to disclose any basis of liability during Liberty’s coverage period.”²

Conversely, claimant contends the Board should modify the August 4, 2005, Order by ordering respondent to pay 11 days of temporary total disability benefits.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of his employment with respondent in a series of mini-traumas commencing in August 2004?
2. If so, did claimant provide respondent with timely notice of the accidental injury?
3. Did claimant sustain an intervening injury to his back that would preclude his entitlement to receive workers compensation benefits in this claim?
4. Is claimant entitled to receive 11 days of temporary total disability benefits?

¹ Resp. and Continental Western’s Brief at 6 (filed Sept. 8, 2005).

² Resp. and Liberty’s Brief at 2 (filed Sept. 19, 2005).

5. Should the Board dismiss Liberty from this claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Although claimant has alleged four different accidents in this claim, only the latest accident was in dispute at the August 4, 2005, preliminary hearing. Accordingly, the preliminary hearing dealt with only the alleged series of accidents or mini-traumas to claimant's back, neck, and hands that allegedly occurred commencing August 2004 and continuing through the date of that hearing.

Claimant works for respondent as a working supervisor. In his job, claimant operated heavy equipment such as cranes, backhoes, trenchers, and bobcats to dig ditches and install traffic lights and street lighting.

Judge Clark determined claimant had sustained personal injury by accident arising out of and in the course of his employment due to the work claimant had performed for respondent through August 3, 2005, the day before the preliminary hearing, and, therefore, awarded claimant medical benefits. At this juncture of the claim, the Board agrees. Accordingly, the August 4, 2005, preliminary hearing Order should be affirmed.

At his attorney's request, claimant saw Dr. Pedro A. Murati in August 2004. The doctor diagnosed both low and mid back strain, left carpal tunnel syndrome, degenerative joint disease in claimant's left thumb, and right hand pain. Since that evaluation, claimant's symptoms have gradually and progressively worsened. From claimant's description of his job duties, it appears claimant performed heavy manual labor along with his supervisory duties. Although claimant did not introduce an expert medical opinion that addressed the specific cause of his present back, neck, and bilateral upper extremity symptoms, neither respondent nor any of its three insurance providers introduced an expert medical opinion to support their contentions that claimant's present problems are the natural consequence of earlier injuries that are also alleged in this claim or the result of an intervening accident outside of work.

The Board concludes that claimant, by the barest of margins, has proven it is more probably true than not that he sustained a series of mini-traumas that resulted in personal injury by accident arising out of and in the course of his employment with respondent due to the strenuous physical work he performed for respondent after August 2004.

At this juncture, the Board will not address on this appeal whether claimant provided respondent with timely notice of his alleged accidental injuries as it is not apparent from

the record that such issue was presented to the Judge. At the preliminary hearing, before the witnesses testified, Builders announced it was disputing liability because the alleged series of mini-traumas occurred outside its coverage period. When asked if Continental Western and Liberty were also “denying compensability,” their attorneys responded affirmatively.³ Moreover, the lack of timely notice was not specifically addressed by any of the four attorneys in their closing arguments.

Likewise, the Board will not address on this appeal Liberty’s request to be dismissed from this claim as that issue was not raised before the Judge. The Workers Compensation Act limits Board review to those issues that were presented to the administrative law judge.

The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.⁴

Finally, the Board does not have jurisdiction at this stage to address claimant’s request for temporary total disability benefits. In appeals of preliminary hearing orders, the Board does not have the jurisdiction to reweigh the evidence and determine whether a worker meets the statutory definition of being temporarily and totally disabled.⁵

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁶

WHEREFORE, the Board affirms the August 4, 2005, Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of November, 2005.

BOARD MEMBER

³ P.H. Trans. at 5-6.

⁴ K.S.A. 44-555c(a).

⁵ See K.S.A. 44-534a(a)(2).

⁶ K.S.A. 44-534a(a)(2).

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 John D. Clark, Administrative Law Judge
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